Statement of William E. Kennard

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on
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Mr. Chairman and Members of the Committee:

Thank you for the opportunity to testify before the Committee today. My fellow Commissioners and I are here to report on the Federal Communications Commission's progress in fulfilling one very important aspect of the mission entrusted to us by Congress and the American people, that of determining when the Bell Companies have opened their markets and otherwise met the requirements of entry into in-region long distance service under section 271 of the Communications Act of 1934. We take our responsibility in this area very seriously. We are mindful of the fact that section 271 is a barrier to entry that excludes a potentially potent competitor from the in-region, interexchange marketplace. But we equally recognize that section 271 sets forth specific criteria that must be satisfied before a Bell Company may be authorized to provide in-region long distance service.

It has been just over two years since Congress passed and the President signed the Telecommunications Act of 1996 into law. As the Congress stated in the preamble to the Conference Report, the 1996 Act established "a pro-competitive, de-regulatory national policy framework." Over the past two years, the Federal Communications Commission, State public utilities commissions, and the Federal State Joint Board on Universal Service have all worked diligently to implement that Act in a way that will ultimately bring widespread choice of telecommunications providers to the American people. I would like to acknowledge the dedication of the many public servants on the staff of the FCC and the state PUCs who have made personal sacrifices to get the job done.

We can now see the initial buds of at least some competition. Already, there are over 100 competitive local exchange providers around the country, with a market value of 14 billion dollars. The top ten CLECs have switches in 132 cities spanning 33 states and the District of Columbia. I do not come here, however, to announce my

satisfaction with the pace of competition. We can and must do better. Nor do these initial signs of competition mean that Bell Companies have already opened markets sufficiently to meet the law's prerequisites to approval of long distance entry. We judge applications according to the criteria set forth in section 271.

To be successful in any endeavor, I believe that one must first identify the ultimate goal, then work steadfastly toward that goal. Thus, I have organized my testimony into the following four parts:

(1) The Goal: "Win-Win" for Consumers;

(2) Section 271: The Means to the End;

(3) An Open and Transparent Process; and

(4) Remaining True to the Statute.

I emphasize that the Commission's work carrying out its responsibilities under section 271 will always be guided, first and foremost, by the words of the statute itself. The statute contains four basic requirements for Bell Company entry into the interLATA interexchange market. The Bell Company must satisfy the Track A or Track B requirements established in section 271(c)(1). The Bell Company must have fully implemented or offer all of the items included in the competitive check list. The Bell Company must also show that it will operate in accordance with the separate affiliate requirements of section 272. Finally, the Commission must find that the requested authorization is consistent with the public interest, convenience and necessity. Our job is not to rewrite the statute, but to implement it. And where the statute itself may not be crystal clear, I believe we should interpret the statute in the manner that is consistent with Congress' expressed desire to open all telecommunications markets to competition.

We will grant 271 approval where a Bell Company can show that it has met all of the statute's requirements, not just, for example, 9 of the 14 items in the section 271 checklist. As indicated above, a Bell Company must also show that its entry is in

the public interest, and that it will meet the requirements of section 272.

The Goal: "Win-Win" for Consumers

The goal of the 1996 Act is to open all telecommunications markets to competition. The theory is that, once local markets are open, competition will follow, which will mean that consumers will have a real choice of local service providers. Once the Bell Companies enter the long distance market, consumers will have an increased choice of long distance providers. Increased choice in both markets translates into a "win-win" for consumers.

The best evidence that competition is truly working is where real consumer choice is present and where the consumer is able to exercise certain fundamental rights. I have attempted to articulate these rights, which are consistent with the statutory provisions of section 271, in what I call a Consumer Competition Bill of Rights:

1. Consumers must ultimately have the right to choose providers -- from as wide a variety of providers as the market will bear.

2. Consumers must be able to move seamlessly, without obstruction or delay, from one provider to another.

3. Consumers must be able to move without changing their phone numbers.

4. Consumers must not be forced to dial extra digits simply because they choose a competitive carrier rather than an incumbent one.

5. Consumers must be able to change carriers without paying unnecessary fees.

The ability of consumers in a given market to exercise these rights is one sure index that the market is open and that the opportunity for true, meaningful competition exists, just as the absence of such rights of selection is an indication that the particular market is not yet open to competitive entry.

While the Commission must work to ensure that all consumers ultimately

enjoy the benefits of this Bill of Rights, let me be clear that section 271 permits Bell Company entry into long distance even before there is some quantifiable amount of competition in the local market. One test for BOC entry into long distance is whether the Bell Company has opened the door to local competition by complying with the statutory requirements, and we will grant a 271 application that meets this test, even if potential competitors have chosen not to walk through that door.

Section 271 also reflects Congress's intention to give consumers the option of purchasing a bundled package of services from a single provider. Up until two years ago, legal barriers prevented most people in this country from purchasing local and long distance telephone service from the same company. Part of Congress's vision, however, was to permit "one-stop shopping" in the telecommunications industry, so that consumers, if they wished, could deal with one phone company, one phone bill, and one customer service representative--all priced competitively. Not surprisingly, it appears that consumers value the simplicity of one-stop shopping. Think about how outdated, inefficient and irrational it would be for the law to force people to purchase milk at one store and cereal at another. If you go to one store because they have the freshest milk, you should be able to buy your cereal there too, if you so choose, and all things being equal.

But what if all things are not equal? What if a lot of stores could sell cereal, but only one store sold milk? Clearly, if everyone had to go to that store to buy their milk, then that store would have a major advantage when it comes to selling cereal as well.

The same is true when it comes to selling local and long-distance telephone service. It makes sense to allow consumers to purchase a bundle of telecommunications services through one-stop shopping from a single provider, but only when all providers have an opportunity to offer each service that goes into the bundle. If a Bell Company can offer long distance service before it has opened its local

market to competition as set forth in section 271, then the Bell Company will continue to dominate the local service market, and also could dominate the market for bundled services. That will harm competition and harm consumers, because consumers will continue to be denied a choice of providers for local service.

Permitting Bell Company entry into the interLATA interexchange market before the local market has been opened to competition is also likely to result in more mega mergers and consolidation rather than competition. If the local market is not open, long distance companies will have no alternative but to merge with a local service provider in order to respond to consumer demand for "one-stop-shopping." And that's why under the Act, Congress wisely required the Bell Companies to open their local markets to competition before they may be authorized to provide long distance services.

Thus, we must focus on the most fundamental goals of the Act, each integral to the other: opening all markets, especially local telecommunications markets, ensuring free consumer choice of every kind, and lowering all barriers to entry in the name of competition. Once these goals are fully realized through the mechanisms of the Act, the deregulation of telephone markets in favor of market forces is possible and desirable. This is the vision of Congress and the end to which every action of the FCC is and shall be directed.

Section 271: The Means to the End

With the goal of consumer choice in mind, we must turn our attention to the logistics of achieving that goal in the most expeditious way possible. Congress laid the framework in the 1996 Act: first ensure that the local telephone market is open to competition, then allow the Bell Companies to offer long distance service. Thus, under the statute, the Bell Companies have an incentive to open up their networks to competitors in order to receive long distance authority. Since Congress passed

the Act two years ago, the FCC has received applications by Bell Companies for four states: we received applications from Ameritech for the state of Michigan, from SBC Corporation for the state of Oklahoma, and from BellSouth for South Carolina and Louisiana. We looked carefully at each application. Unfortunately, none of them met the statutory requirements established by Congress. In this regard, I note that the U.S. Court of Appeals for the D.C. Circuit recently upheld our decision not to grant SBC's application for interLATA interexchange entry in Oklahoma, concluding that the Commission's interpretation of both Track A and Track B was reasonable. Although the facts presented in these applications were different, there was one common thread: the competing providers in each state did not have the same access to the local network that the Bell Company enjoys. Therefore, the local market was not open. Without the same access, competitors cannot provide customers with the same service and, therefore, consumers do not have a realistic choice of service providers.

The Commission's orders denying the three most recent 271 applications have placed great emphasis on the inadequacy of the Bell Companies' operations support systems or "OSS." As a prerequisite to long distance entry, the statute requires Bell Companies to share their networks with new entrants and to allow new entrants to resell Bell Company services. In order for a new entrant to exercise this right in a meaningful way, the new entrant needs access to the information, systems and personnel necessary to support those elements and services. OSS access provides new entrants with the ability to order service for their new customers. OSS access is important because it enables new entrants to communicate effectively with the Bell Company regarding such basic activities as placing orders or providing repair service for customers.

I have heard discussions of OSS in which the relationship between the Bell Company and a new entrant is compared to the relationship between a catalogue wholesaler and a retail merchant that serves as an outlet for the wholesaler's goods. In

order to serve its own customers, the retailer needs to know such things as: what goods and services the wholesaler offers; how to order from the wholesaler; when the wholesaler will deliver the ordered goods and services; how to check on the status of the order; and how to get replacements or repairs if the goods or services provided by the wholesaler are defective or break down. If the wholesaler cannot guarantee when the goods will be delivered, or if the wholesaler delivers the product in a defective or untimely manner, it is the retailer that will suffer the customer's wrath. Telling the customer that it is the wholesaler's fault will not help.

OSS provides new entrants the type of information and assistance for which a retailer relies on a wholesaler. If OSS works, the new entrant is able to offer the services the customer wants, make them available on a timely basis, and provide repair and maintenance when needed. The Bell Company relies on OSS to market its own services, and the nondiscrimination provisions of the 1996 Act rightly require the Bell Company to give its competitors nondiscriminatory access to the same systems.

Now some have asked: where is OSS on the 14-point checklist? The answer is that OSS is an unbundled network element, and thus is directly encompassed by checklist item (ii). Moreover, it directly or indirectly impacts nine out of the remaining 13 checklist items. When we ask new entrants what is the most important obstacle to providing competitive local exchange service, the majority of them inevitably answer: gaining nondiscriminatory access to a Bell Company's operations support systems. The Department of Justice's evaluations in the context of each section 271 application, to which we are required by statute to give substantial weight, have focused primarily on the Bell Companies' OSS systems. Likewise, an overwhelming portion of the public record in each application proceeding has focused on the Bell Companies' OSS. Thus, the Commission has provided detailed guidance in this critical area, to ensure that Bell Companies are providing competitive carriers with the same type of access to its OSS that the Bell Company itself enjoys. In fact, if the problems with a Bell Company's OSS

are resolved, it is my belief that many other checklist items will fall into place.

That is not to say that compliance with other checklist items is not important. To the contrary, the other checklist items are crucial to making competition possible, and the statute requires that all 14 checklist items must be satisfied before the Commission may grant a Bell Company's long distance application. For instance, checklist item 11 requires that Bell Companies provide for number portability -- the ability to retain one's phone number even when switching carriers. If my grandmother had to change the phone number she has had for the past 50 years in order to change service providers, that would be a major disincentive for her to switch phone companies. The same is even more true for businesses. Would a pizza delivery service want to change phone companies if that meant getting a new phone number, when it knows that its current phone number is plastered on advertising, printed in phone directories, and etched into the minds of its most loyal customers? Of course not. Number portability is crucial to competition.

Another example is access to 911 service. Competitors will rely on the Bell Company for access to 911 service. No one would want to receive phone service from a new competitor that could not guarantee effective access to police, fire, and rescue services. Based on our recent experience with 271 applications, what we see emerging is a hierarchy of checklist items. All of them must be satisfied, but some require more work to satisfy than others. Developing an interface that provides competing carriers with nondiscriminatory access to a Bell Company's OSS in the context of providing unbundled network elements (checklist item 2) is likely to take more time, for example, than providing white pages directory listings for customers of another carrier's telephone service (checklist item 8). By focusing our attention on the issues that have generated the most controversy, we have tackled the most difficult checklist items first.

In addition to meeting the competitive checklist, the Bell Company must

demonstrate that it will comply with the safeguards in section 272. Section 272 requires that a Bell Company's in-region, long distance services be provided through a separate affiliate and establishes requirements for interaction between the separate affiliate and the Bell Company.

Section 271 also requires that the Bell Company demonstrate that its entry into the long distance market in a particular state would be consistent with the public interest. The Act sets out the public interest test as an independent requirement that must be met in addition to the other statutory requirements. The Commission previously has stated that it will consider a variety of factors in deciding when Bell Company entry into the interLATA interexchange is consistent with the public interest. The Commission discussed some of these factors in the Ameritech Michigan Order.

An Open and Transparent Process

I am committed to enhancing the Commission's review and disposition of section 271 applications, and I welcome your suggestions in this regard. We must have an orderly and predictable process for consideration of Bell Companies' section 271 applications for entry into the long distance market. As part of this process, Bell Companies should have adequate information concerning the measures that they must take to satisfy the requirements established by Congress in section 271, including the competitive checklist.

Although the Commission has not conducted a rulemaking addressing the requirements of section 271, virtually all of the checklist items cross-reference or duplicate substantially other sections of the Act, particularly section 251. The Commission's rules implementing sections 251 and 252 directly set forth the requirements the Bell Companies must meet. Most of these rules were upheld by the United States Court of Appeals for the Eighth Circuit on review. In its recent orders reviewing section 271 applications, the Commission has addressed a number of

checklist issues, including interconnection, access to operations support systems and other network elements, local transport, switching, access to 911/E911 services, number portability, and resale.

To provide even more guidance, especially on items not yet addressed in previous applications, I instructed Commission staff last December to initiate a dialogue with the Bell Companies, competitive local exchange providers, and other interested parties. The vision is to create a transparent process that will add predictability to section 271 applications. Since January, more than 30 FCC staff members have participated in these meetings on a regular basis. We have also visited with state commissions in Michigan, South Carolina, Texas and New York, and we expect to visit more in the future. We have viewed Bell Company OSS operations on-site -- Ameritech in Milwaukee, SBC in Dallas, and Bell South in Atlanta. I myself took a look at BellSouth's OSS in New Orleans. We will look carefully at future demonstrations of OSS systems to see what new entrants need to do compared to what the Bell Company retail customer representatives have to do to order service.

I am pleased to report that we have already received generally positive feedback about the new process thus far. I am confident that this dialogue, in conjunction with the guidance we have provided in past Commission orders, will help the Bell Companies understand the performance requirements set forth in the Act. I believe that the positive steps taken by the Bell Companies in recent months to meet the requirements of the Act signify that the steps required by section 271 are achievable.

Let me be clear, however, that the dialogue we have initiated is not a process of negotiation. We will not prejudge a Bell Company's compliance with section 271. Each application will be decided on the merits, within the 90-day statutory period, and based solely on the record that is developed during that period.

But we can bring clarity to the requirements, which should facilitate the

submission of stronger applications in the future.

Remaining True to the Statute

We want and need the 271 application process to bring the benefits of competition to the American people. The Bell Companies must, however, take the steps necessary to open their markets. Two truths are absolutely fundamental to the FCC's role in the 271 process Congress devised: we will not grant long distance authorization to companies that have not opened their markets; we will grant entry to those that have. I believe that it should not be otherwise.

Opening markets and creating an infrastructure for competition is hard work. It's hard work for the incumbent; it's hard work for new competitors, and it's hard work for the policy makers. Those within companies charged with creating and meeting competition need to resolve complex operational issues. They need to design system interfaces and write software. They need to negotiate contracts, arbitrate differences, sign agreements and implement them. For policy makers, we must insist that this hard work be done -- and that the parties create or have available swift, meaningful ways to enforce obligations under these agreements.

All that takes time. And while some call it "regulatory," it's actually deregulatory. Because competition and choice won't exist unless local telephone companies create this competitive infrastructure and unless they keep this infrastructure well-maintained and running smoothly.

Some have argued that we could increase local competition even faster by letting the Bell Companies into long distance, regardless of whether the local market is open. Letting the Bell Companies into long distance before they have opened their markets to competition would be to turn the provisions of the 1996 Act on their head. In the Act, Congress was very clear about the plan of action: first open the local markets, then the Bell Companies can provide long distance service. If the Bell Company has

not complied with the market-opening requirements of the Act, section 271(d)(3) commands that "[t]he Commission shall not approve the authorization requested . . . ."

And what is likely to happen if the Bell Companies are able to enter the long distance market before their local markets are open to competition? More mega mergers are likely to result, rather than more competition. If the local market is not open, and the long distance carriers are forced to offer local service in order to retain their primary customer base, they will have no alternative but to merge with an incumbent local exchange carrier. More consolidation in the telecommunications industry damages the prospects for competition in both the local and long distance markets -- a "lose-lose" for consumers, not a "win-win."

Conclusion

The goal of the 1996 Act, and section 271 in particular, is to provide the American public with a realistic choice of service providers. We are all working hard to get to the point where choice exists; it's in everyone's interest that we get there sooner rather than later. The dialogue we have begun is helping greatly. No one looks forward with greater anticipation than I to receiving successful applications -- which will mean that a local market is truly open to competition.

I appreciate the opportunity to testify today and I also look forward to any questions that you and any other members of the Committee may have.